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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 127

EVELYN F. GREGORY, PETITIONER,

vs.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR CERTIORARI FILED JUNE 23, 1934.

CERTIORARI GRANTED OCTOBER 8, 1934.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934.

No. 127

EVELYN F. GREGORY, PETITIONER,

vs.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 55299

EVELYN F. GREGORY, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

DOCKET ENTRIES

Appearances:

For Taxpayer: Albridge C. Smith, Esq., George W. Saam, Esq.
For Comm'r: E. L. Corbin, Esq.

1931.

Apr. 3. Petition received and filed. Taxpayer notified. (Fee paid.)
" 3. Copy of petition served on General Counsel.
Oct. 2. Answer filed by General Counsel.
" 10. Copy of answer served on taxpayer. General Calendar.

1932.

Aug. 11. Hearing set Oct. 10, 1932.
Oct. 10. Notice of the appearance of Geo. W. Saam as counsel for taxpayer filed.

[fol. 2]

Oct. 10. Hearing had before Mr. Sternhagen, Div. 10 on merits. Submitted. Brief due Nov. 14, 1932, reply briefs due Nov. 24, 1932—exchange by parties.
" 19. Transcript of hearing of Oct. 10, 1932 filed.
Nov. 14. Brief filed by taxpayer. 11/14/32 copy served.
" 14. Brief filed by General Counsel.
" 24. Reply brief filed by taxpayer.
Dec. 6. Opinion rendered, Mr. Sternhagen, Div. 10. Judgment will be entered under Rule 50.

1933.

Jan. 3. Notice of settlement under Rule 50 filed by taxpayer. 1/10/33 copy served.

" 6. Hearing set Jan. 23, 1933 on settlement under Rule 50.

" 25. Hearing had before Mr. Marquette, Div. 1, on merits. Settlement under Rule 50—not contested—referred to Mr. Sternhagen.

" 26. Judgment entered, Div. 10. Mr. Sternhagen.

Mar. 20. Motion to vacate judgment of Jan. 26 filed by taxpayer.

" 20. Stipulation as to deficiency filed.

" 25. Order that judgment entered Jan. 26, 1933 be vacated and judgment entered, Mr. Sternhagen, Div. 10.

[fol. 3]

June 19. Petition for review by U. S. Circuit Court of Appeals (2) with assignments of error filed by General Counsel.

" 23. Proof of service filed on taxpayer.

" 27. Proof of service on taxpayer's attorney filed.

Aug. 14. Motion for extension to 10/1/33 to complete record filed by General Counsel.

" 14. Order enlarging time to Oct. 30, 1933 for preparation of evidence and delivery of record entered.

Oct. 19. Motion for extension to 10/29/33 to complete the record filed by General Counsel.

" 19. Order enlarging time to Nov. 29, 1933 for preparation and delivery of record entered.

Nov. 18. Statement of evidence lodged.

" 23. Statement of evidence approved and ordered filed.

" 27. Præcipe with proof of service thereon filed by General Counsel.

" 28. Motion for extension to Jan. 2, 1934 to transmit record filed by General Counsel.

" 28. Order enlarging time to Jan. 2, 1934 for transmission of record entered.

[fol. 4] BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

PETITION

The above-named petitioner hereby petitions for re-determination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency bearing symbols: IT:AR:MPB-60D A-2 dated February 12, 1931, and as a basis of this proceeding alleges as follows:

1. The petitioner is an individual with a residence at 1423 Albemarle Road, Brooklyn, New York.

2. The notice of deficiency, a copy of which is attached and marked Exhibit "A", was mailed to the petitioner on February 12, 1931.

3. The taxes in controversy are income taxes for the calendar year 1928 and are for $10,678.16.

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

[fol. 5] (a) The elimination from capital net gain taxable at the rate of 12½% of $76,007.88 (being the difference between $133,333.33, the value of 1,000 shares of common stock of Monitor Securities Corporation received by petitioner from Averill Corporation on the liquidation thereof, and $57,325.45, the cost to petitioner of the stock of Averill Corporation.)

(b) The addition to the net income of $133,333.33 as a dividend received by petitioner from the United Mortgage Corporation.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) United Mortgage Corporation is a corporation organized under the laws of the State of New York, having a capital stock represented by 5,000 shares of the par value of $100 a share.

(b) Petitioner was at all times during the year 1928 from and after January 3, 1928, the owner of 5,000 shares of the capital stock of United Mortgage Corporation. Said 5,000 shares then constituted and still constitute the entire out-

standing capital stock of United Mortgage Corporation and were acquired by petitioner as follows:

[fol. 6] October 1, 1920	19 shares	
November 1, 1920	800 shares	
December 31, 1920	6 shares	
January 1, 1921	10 shares	
April 10, 1921	250 shares	
November 18, 1921	300 shares	
November 18, 1921	115 shares	—100% Stock Dividend
December 15, 1921	1500 shares	
December 16, 1921	300 shares	
January 12, 1927	475 shares	
January 15, 1927	200 shares	
April 13, 1927	125 shares	
April 13, 1927	75 shares	
December 29, 1927	225 shares	
January 3, 1928	600 shares	
	5000 shares	

(c) Averill Corporation is a corporation organized on or about September 18, 1928, under the laws of the State of Delaware, with a capital stock consisting of 500 shares of the par value of $10 each.

(d) On September 21, 1928, United Mortgage Corporation and Averill Corporation entered into an agreement whereby United Mortgage Corporation agreed to transfer to Averill Corporation 1,000 shares of the common stock of Monitor Securities Corporation, owned by United Mortgage Corporation, in exchange for the entire capital stock of Averill Corporation, to be distributed pro rata to the stockholders of United Mortgage Corporation. Said 1,000 shares of common stock of Monitor Securities Corporation [fol. 7] had been acquired by United Mortgage Corporation by purchase on January 6, 1922.

(e) On September 21, 1928, pursuant to this agreement United Mortgage Corporation transferred to Averill Corporation said 1,000 shares of common stock of Monitor Securities Corporation and petitioner acquired the entire outstanding capital stock of Averill Corporation, consisting of 500 shares, without the surrender by petitioner of any of the stock of United Mortgage Corporation owned by her.

(f) At the time of the transaction described in subpara-

graph (e) above, the market value of the assets of United Mortgage Corporation was $814,064.25. The value of 1,000 shares of the common stock of Monitor Securities Corporation included in such assets was $133,333.33, or 16.3787% of the value of the entire assets of United Mortgage Corporation. The cost to petitioner of the 5,000 shares of United Mortgage Corporation was $350,000. The cost to the petitioner of the 500 shares of the capital stock of Averill Corporation was 16.3787% of $350,000 or $57,325.45.

(g) On September 24, 1928, Averill Corporation was dissolved and, in liquidation, distributed in kind to its stockholders its entire assets consisting of 1,000 shares of common stock of Monitor Securities Corporation. Pursuant to such liquidation, petitioner became the owner of 1,000 shares of the common stock of Monitor Securities Corpora- [fol. 8] tion, having a value at the time of such distribution and liquidation of $133,333.33.

(h) On September 24, 1928, petitioner sold the 1,000 shares of the common stock of Monitor Securities Corporation received from Averill Corporation for $133,333.33.

(i) On or prior to March 15, 1929, the petitioner duly filed her income tax return with the Collector of Internal Revenue for the First District, New York, and reported thereon the receipt of a capital net gain of $76,007.88 (the difference between $133,333.33, the value at the time of distribution of the 1,000 shares of common stock of Monitor Securities Corporation, and $57,325.45, the cost to her of the capital stock of Averill Corporation) and paid a tax thereon at the rate of 12½%. A complete statement of the items reported by the petitioner in her income tax return for the year 1928 is as follows:

Interest received	$1,484.88
Interest received on bonds having a tax-free covenant clause	1,097.93
Dividends on stocks of domestic corporations	7,162.50
	$9,745.31
Deductions	482.88
Ordinary Net Income	$9,262.43
Capital net gain on various securities (including the $76,007.88 gain derived from the common stock of Monitor Securities Corporation)	$97,603.43

[fol. 9] (j) The petitioner on the basis of such return paid a tax of $12,178.47.

(k) The Commissioner of Internal Revenue in his determination of the tax liability of petitioner has eliminated from capital net gain the sum of $76,007.88 and has added to net income the sum of $133,333.33 as a dividend received by petitioner from United Mortgage Corporation. On the basis of such determination the Commissioner of Internal Revenue has assessed against petitioner an additional tax of $10,678.16.

Wherefore the petitioner prays that this Board may hear the proceeding and determine (1) that the petitioner correctly reported in her income tax return for the year 1928, the receipt by her of 1,000 shares of common stock of Monitor Securities Corporation as a capital net gain of $76,007.88, taxable at the rate of 12½%; (2) that $133,333.33, the value of 1,000 shares of common stock of Monitor Securities Corporation, should not be added to net income as a dividend received by petitioner for the year 1928; and (3) that no deficiency in income tax due from the petitioner for the year 1928, exists.

Evelyn F. Gregory, Petitioner. Albridge C. Smith, Counsel for Petitioner. Humes, Buck, Smith & Stowell, Office and Post Office Address: 50 Broadway, Borough of Manhattan, City and State of New York.

[fol. 10] *Duly sworn to by Evelyn F. Gregory. Jurat omitted in printing.*

[fol. 11] EXHIBIT "A" TO PETITION

NP-2-28.

IT:AR:A-2.
MPB-60D.
Copy mailed Feb. 12, 1931.

Mrs. Evelyn F. Gregory, 1423 Albemarle Road, Brooklyn, New York.

MADAM: You are advised that the determination of your tax liability for the year(s) 1928 discloses a deficiency of $10,678.16, as shown in the statement attached.

In accordance with section 272 of the Revenue Act of 1928, notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter, you may petition the United States Board of Tax Appeals for a redetermination of your tax liability.

However, if you do not desire to petition, you are requested to execute the enclosed agreement form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing of this agreement will expedite the closing of your return(s) by permiting an early assessment of any deficiency and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the enclosed agreement, or on the date assessment is [fol. 12] made, whichever is earlier; whereas if no agreement is filed, interest will accumulate to the date of assessment of the deficiency.

Respectfully, David Burnet, Commissioner, by
(Signed) J. C. Wilmer, Deputy Commissioner.

Enclosures: Statement. Form 882. Form 870.
Ke-4

BEFORE UNITED STATES BOARD OF APPEALS

[Title omitted]

ANSWER

Now comes the Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, and for answer to the petition of this taxpayer admits and denies as follows:

[fol. 13] 1. Admits the allegations contained in paragraph 1.

2. Admits that the notice of deficiency was mailed to the petitioner on February 12, 1931. Denies the other allegations contained in paragraph 2.

3. Admits the allegations contained in paragraph 3.

4(a) and (b). Denies that the Commissioner erred as stated in sub-paragraphs (a) and (b) of paragraph 4.

5(a) to (k), inclusive. Denies the allegations contained in sub-paragraphs (a) to (k), inclusive, of paragraph 5.

Denies generally and specifically each and every allegation contained in the taxpayer's petition not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that the taxpayer's appeal be denied.

(Signed) C. M. Charest, General Counsel, Bureau of Internal Revenue. Of Counsel: James L. Backstrom, Special Attorney, Bureau of Internal Revenue.

[fol. 14] BEFORE UNITED STATES BOARD OF TAX APPEALS

27 B. T. A.

Docket No. 55299

EVELYN F. GREGORY, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Promulgated December 6, 1932.

Petitioner, the only shareholder of U Company, caused A Company to be organized. U Company transferred assets, consisting of shares in M Company, to A Company for which A Company issued all its shares to petitioner. A Company then liquidated by distributing its assets, consisting of shares in M Company, to petitioner, its only shareholder, and immediately dissolved. Petitioner then sold the shares in M Company. Held, A Company may not be disregarded, and tax to petitioner is predicated upon the statutory recognition of a reorganization, liquidation and sale, with consequent gain or loss, and not upon an assumed dividend to petitioner by U Company.

George W. Saam, Esq., for the petitioner.

E. L. Corbin, Esq., for the respondent.

OPINION

[fol. 15] STERNHAGEN:

The respondent determined a deficiency of $10,678.16 in the petitioner's income tax for 1928, all of which is assailed

by the petitioner on the ground that the respondent has erroneously treated $133,333.33 as a dividend from the United Mortgage Corporation. There is no dispute about the facts, both parties having agreed that they are essentially as set forth in the report of a revenue agent.

The petitioner was the owner of all the outstanding (5,000) shares of the United Mortgage Corporation. Of these, 3,300 shares had been purchased between October 1, 1920, and December 16, 1921, at a cost of $180,000, and 1,700 shares between January 12, 1927, and January 3, 1928, at a cost of $170,000. The United corporation had among its assets 1,000 shares of the Monitor Securities Corporation. On September 18, 1928, the Averill corporation was organized under Delaware law. On September 20, 1928, the United corporation transferred to the Averill corporation the 1,000 shares of Monitor stock, in consideration for which the Averill corporation issued its shares to the petitioner. On September 24, 1928, the Averill corporation liquidated and dissolved, thus distributing its entire assets, consisting of the Monitor shares to its only shareholder, the petitioner. On the same date as the liquidation distribution, petitioner sold the Monitor shares for $133,333.33.

In her return, she treated these several transactions as governed by the several reorganization provisions of the statute, and returned as capital net gain derived from the [fol. 16] sale price of $133,333.33 the amount of $76,007.88 upon an apportioned cost basis of $57,325.45.

None of the foregoing facts or figures is in dispute, the respondent conceding that if the petitioner was legally correct in applying the reorganization provisions of the statute to the situation, her computation of gain is correct. His determination is based upon the view that the creation of the Averill corporation was without substance and must therefore be disregarded, and that the petitioner must be taxed as upon a dividend consisting of the amount received upon the sale of the Monitor shares as if such amount had been distributed by the United corporation directly to her. He argues that the mere organization of the Averill corporation for the purpose, as it is conceded, of enabling the petitioner and the United corporation to avoid tax, followed almost immediately by the dissolution of the Averill corporation, was a transparent fiction.

In our opinion, the respondent erred in disregarding the Averill corporation. During the short period of its exist-

ence it performed its function of issuing its shares, taking and holding the Monitor shares, and then distributing them in liquidation. As long as corporations are recognized before the law as if they were creatures of substance, there is nothing to distinguish this corporation from innumerable others, whether they be devised to achieve a temporary tax reduction or some other legitimate end. Congress has not left it to the Commissioner to say, in the absence of fraud or other compelling circumstance, that the corporate form may be ignored in some cases and recognized in others. [fol. 17] Whatever can be said of the wisdom of recognizing the corporate device, the taxing statutes have so plainly accepted it and provided the detailed methods of taxing its transactions, that to disregard it in a case like this would vary the time, method and amount of tax which the statute imposes.

The purpose to reduce taxes does not control the recognition of the corporation, Bullen v. Wisconsin, 240 U. S. 625, nor does the extent of its legitimate function or operations. Its existence can not be denied to escape liability, Nowland Realty Co. v. Commissioner, 47 Fed. (2d) 1018; People v. Williams, 198 N. Y. 54; 91 N. E. 266; 112 West 59th Street Corp., 23 B. T. A. 767, and with equal force it may enjoy its corporate benefits. That the petitioner was its sole shareholder does not serve to obscure its identity, Planters Cotton Oil Co., Inc. v. Hopkins, 286 U. S. 332, else the United corporation would likewise be obliterated, and this is not suggested. The shortness of its life does not indicate less than a complete entity while it lived. Regal Shoe Co., 1 B. T. A. 896.

It should be remembered when considering the effects upon tax liability of corporate plans that the statute has, since the Act of 1918, provided in more or less detail the system of tax determination, and this system unmistakably permits the bona fide use of the corporate device. That its effect may be, as here, to tax a profit piecemeal over several periods is so clearly within the legislative system that it can not be denied. As a result of it, the benefit of one year may be the burden of another; and the incidence of the statute may be as favorable to the govern- [fol. 18] ment in one case as it is unfavorable in another. A statute so meticulously drafted must be interpreted as a literal expression of the taxing policy and leaves only the

small interstices for judicial consideration. The general legislative plan apparently was to recognize the corporate entity and, in view of such recognition, to specify when the gains or losses would be recognized and upon what basis they should be measured. We may not destroy the effectiveness of this statutory plan by denying recognition to the corporation and thus preventing consideration of its transactions.[1]

The recognition of the Averill corporation being determined, it follows as the respondent concedes, that the petitioner's computation of gain was correct. There was a statutory reorganization under Revenue Act of 1928, section 112(i), and hence no gain to the petitioner as distributee from the United corporation of the Averill shares, section 112(g). See Miller on Reorganizations, ch. 13. The effect was to apportion the basis formerly applicable to petitioner's United shares between the United shares and the Averill shares, section 113(a) (9); Reg. 74, Art. 600; Miller on Reorganization, ch. 20. The liquidation of the Averill corporation, whereby petitioner received the Monitor shares, resulted in gain or $76,007.88, the difference between the undisputed basis of $57,325.45 attributed to the Averill shares, and $133,333.33, the undisputed value of the Monitor shares so received section 115(c). The immediate [fol. 19] sale by petitioner of the Monitor shares for no more than their value as used in the foregoing computation resulted in the realization by her of no further gain. See Edgar J. Hesslein, 21 B. T. A. 61, affirmed 53 Fed. (2d) 1081; I. T. 2259, V-1 C. B. 18; I. T. 2530; IX-1 C. B. 194.

Since only 3,300 of her United shares were held by petitioner more than two years, her gain was subject to the capital gains provision, section 101, only to a like extent. This the petitioner concedes.

Judgment will be entered under Rule 50.

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[1] Section 112 (k), Revenue Act of 1932, is an indication that when a corporation is not to be "considered as a corporation" the statute expressly says so.

BEFORE UNITED STATES BOARD OF TAX APPEALS—
WASHINGTON

[Title omitted]

JUDGMENT

Subsequent to the Board's report of December 6, 1932, 27 B. T. A. 223, the petitioner filed a proposed judgment which was duly set for hearing. No objections having been made by the respondent, it is

[fol. 20] Ordered, adjudged and decided that there is no deficiency in income tax for 1928.

Enter.

(Signed) John M. Sternhagen, Member.

BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 55299

EVELYN F. GREGORY, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

ORDER VACATING JUDGMENT AND SUBSTITUTED JUDGMENT

Pursuant to the motion filed by petitioner March 20, 1933, to which is appended a stipulation of both parties, it is

Ordered that the judgment entered January 26, 1933, be and it hereby is vacated and set aside; and in substitution therefor it is

Ordered, adjudged and decided that there is no deficiency in petitioner's income tax for 1928 and that there is an over-payment of said tax of $974.70.

Enter.

(Signed) John M. Sternhagen, Member.

[fol. 21] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

[Title omitted]

PETITION FOR REVIEW AND ASSIGNMENTS OF ERROR

To the Honorable Judges of the United States Circuit Court of Appeals for the Second Circuit:

Now comes Guy T. Helvering, Commissioner of Internal Revenue, by his attorneys, Sewall Key, Special Assistant to the Attorney General, E. Barrett Prettyman, General Counsel, Bureau of Internal Revenue, and Dean P. Kimball, Special Attorney, Bureau of Internal Revenue, and respectfully shows:

I

That he is the duly appointed, qualified and acting Commissioner of Internal Revenue, appointed and holding office by virtue of the laws of the United States; that Evelyn F. Gregory (hereinafter called the taxpayer) is an individual, a citizen of the United States and an inhabitant of the [fol. 22] State of New York, which is within the jurisdiction of the United States Circuit Court of Appeals for the Second Circuit; that more particularly her residence is 1423 Albemarle Road, Brooklyn, New York.

II

That the nature of the controversy is as follows, to-wit:

The taxpayer was at all times during the year 1928 material hereto the sole stockholder of the United Mortgage Corporation. At that time she owned 5,000 shares, which constituted the entire outstanding capital stock of said corporation, and of these 3,300 shares had been purchased between October 1, 1920, and December 16, 1921, at a cost of $180,000.00, and 1,700 shares between January 12, 1927, and January 3, 1928, at a cost of $170,000.00.

The United Mortgage Corporation had among its assets 1,000 shares of the Monitor Securities Corporation.

The taxpayer and also the United Mortgage Corporation desired to dispose of this last-mentioned stock in such manner as to avoid tax. With that end in view, the Averill Corporation was organized under Delaware law on Sep-

tember 18, 1928. To this corporation the United Mortgage Corporation, on September 20, 1928, transferred the 1,000 shares of Monitor stock, in consideration for which the Averill Corporation issued all its shares to the taxpayer. On or about September 24, 1928, the Averill Corporation liquidated and dissolved, and in doing so distributed its entire assets, which consisted of the Monitor shares, to its [fol. 23] only shareholder, who was the taxpayer.

On the same day that the taxpayer received the Monitor shares in distribution, she sold them for $133,333.33. In her 1928 return the taxpayer reported a capital net gain as the result of the transactions above mentioned in the amount of $76,007.88. This was predicated upon a sales price of $133,333.33 and an apportioned costs basis of $57,325.45.

The Commissioner, however, treated the distribution of said Monitor stock as an ordinary dividend in the amount of $133,333.33. This determination was based upon the view that the Averill Corporation should be disregarded and the receipt of the Monitor stock considered as if the same had been distributed by the United Mortgage Corporation directly to the taxpayer. As the result of his determination, the Commissioner asserted a deficiency in tax liability for 1928 in the amount of $10,678.16.

III

That the taxpayer appealed from said determination of the Commissioner to the United States Board of Tax Appeals; that the Board sustained the position of the taxpayer and ruled that the distribution to the taxpayer of the Monitor stock did not constitute an ordinary dividend but a distribution in liquidation of the Averill Corporation; that the Board ordered and decided that there was an overpayment of income tax for the year 1928 in the amount of $974.70; that the Board's findings of fact and opinion were promulgated December 6, 1932, and its final order of re- [fol. 24] determination adjudging that there was an overpayment of $974.70 was entered March 25, 1933.

IV

That said Commissioner, being aggrieved by the conclusions of law made by the Board of Tax Appeals in its said report and also by the said order of redetermination, de-

sires to obtain a review of said report and order by the United States Circuit Court of Appeals for the Second Circuit and as reasons for such review he alleges that the Board, in rendering its opinion and entering its final order of redetermination, committed the following errors:

1. The Board erred in failing to hold that the receipt by the taxpayer of the Monitor stock was taxable to her as an ordinary dividend;

2. The Board erred in failing to hold that the receipt by the taxpayer of the Averill stock was taxable to her as an ordinary dividend;

3. The Board erred in holding that the receipt by the taxpayer of the Monitor stock was taxable to her as a liquidating dividend from the Averill Corporation;

4. The Board erred in failing to disregard corporate existence of the Averill Corporation;

5. The Board erred in failing to treat the distribution to the taxpayer of the Monitor stock as a distribution by the United Mortgage Corporation;

[fol. 25] 6. The Board erred in failing to hold that the cancellation of its stock by the Averill Corporation and the accompanying distribution to the taxpayer of the Monitor stock was made at such time and in such manner as to be the essential equivalent of an ordinary dividend.

7. The Board erred in failing to affirm the Commissioner's determination.

8. The Board erred in deciding that there was an overpayment in tax for the year 1928 in the amount of $974.70.

Wherefore the Commissioner petitions that said report and decision of the United States Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Second Circuit; that a transcript of the record be prepared in accordance with the law and with the rules of said court and be transmitted to the clerk of said court for filing; and that appropriate action be taken to the end that the errors herein complained of may be reviewed and corrected by said court.

(Sgd.) Sewall Key, Special Assistant to the Attorney General. (Sgd.) E. Barrett Prettyman, Gen-

eral Counsel, Bureau of Internal Revenue. Of Counsel: (Sgd.) Dean P. Kimball, Special Attorney, Bureau of Internal Revenue.

[fol. 26] UNITED STATES OF AMERICA,
District of Columbia, ss:

E. Barrett Prettyman, being duly sworn, says that he is General Counsel of the Bureau of Internal Revenue and as such is duly authorized to verify the foregoing petition for review; that he has read said petition and is familiar with the contents thereof; that said petition is true of his own knowledge except as to the matters therein alleged on information and belief, and as to those matters he believes it to be true.

(Sgd.) E. Barrett Prettyman.

Sworn and subscribed to before me this 17th day of June, 1933. (Sgd.) Marcellette M. Taylor, Notary Public. My Commission expires March 31, 1935.

[fol. 27] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

NOTICE OF FILING PETITION FOR REVIEW

To Mrs. Evelyn F. Gregory, 1423 Albemarle Road, Brooklyn, New York:

You are hereby notified that the Commissioner of Internal Revenue did, on the 19th day of June, 1933, file with the Clerk of the United States Board of Tax Appeals, Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Second Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 19th day of June, 1933.

(Sgd.) E. Barrett Prettyman, General Counsel, Bureau of Internal Revenue.

[fol. 28] Service of the above and foregoing notice, together with a copy of the petition for review and assign-

ments of errors mentioned therein, was made June 20, 1933, upon the undersigned who represented the respondent herein before United States Board of Tax Appeals.

(Sgd.) George W. Saam.

IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

NOTICE OF FILING PETITION FOR REVIEW

To George W. Saam, Esq., Humes, Buck, Smith & Stowell, 50 Broadway, New York, N. Y.:

You are hereby notified that the Commissioner of Internal Revenue did, on the 19th day of June, 1933, file with [fol. 29] the Clerk of the United States Board of Tax Appeals, Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Second Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 19th day of June, 1933.

(Sgd.) E. Barrett Prettyman, General Counsel, Bureau of Internal Revenue.

Service of the above and foregoing notice, together with a copy of the petition for review and assignments of errors mentioned therein, was made June 21, 1933, upon the undersigned who represented the respondent herein before United States Board of Tax Appeals.

George W. Saam.

[fol. 30] IN UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE SECOND CIRCUIT

Docket No. 55299

GUY T. HELVERING, Commissioner of Internal Revenue, Petitioner,

v.

EVELYN F. GREGORY, Respondent

Statement of Evidence

This cause came on for hearing before the Hon. John M. Sternhagen, Member of the United States Board of

Tax Appeals at Washington, D. C., on October 10, 1932. Evelyn F. Gregory (hereinafter referred to as "the taxpayer") appeared by her attorney George W. Saam; and the Commissioner of Internal Revenue (hereinafter referred to as "the Commissioner") appeared by his attorneys, C. M. Charest, General Counsel, Bureau of Internal Revenue, and E. L. Corbin, Special Attorney, Bureau of Internal Revenue.

REPRESENTATIONS AS TO FACTS

Thereupon the attorney for the taxpayer made the following representations to the Board of Tax Appeals with respect to the facts of the case:

"In 1928 Mrs. Gregory, the taxpayer, was the sole stockholder of the United Mortgage Corporation. She owned 5,000 shares constituting their entire outstanding capital stock. She had acquired this stock at various times since the year 1920. The United Mortgage Corporation owned [fol. 31] 1,000 shares of the stock of the Monitor Securities Corporation and those are the shares of stock which are in question in this case.

"In 1928 certain bankers began negotiations for the purchase of all of the stock of the Monitor Securities Corporation. The United Mortgage Corporation, with 1,000 shares, had only a small minority interest of the total outstanding stock of the Monitor Securities Corporation, which amounted to 45,000 shares of the common stock. It became evident that, if the United Mortgage Corporation sold the stock, double taxation would accrue; that is, a tax to the corporation and a tax to Mrs. Gregory on the distribution to her as a stockholder, as a dividend. She, in conference with attorneys, frankly sought a way to avoid the payment of a double tax.

"On the basis of this, Averill Corporation was formed in the State of Delaware on or about September 21, 1928. Averill Corporation entered into a plan of reorganization with United Mortgage Corporation, which provided that United Mortgage Corporation should transfer part of its assets, consisting of 1,000 shares of common stock of the Monitor Securities Corporation, to Averill Corporation in exchange for the issuance by Averill Corporation of its entire outstanding and issued capital stock, to Mrs. Gregory as the sole stockholder of the United Mortgage Cor-

poration, without the surrender by Mrs. Gregory of any of her stock or other securities in United Mortgage Cor-
[fol. 32] poration. This plan was carried out on or about the 21st of September, 1928. Averill Corporation thereafter immediately began proceedings for its dissolution. They were begun on or about September 21, 1928, and concluded September 24, 1928. Averill Corporation distributed, in complete liquidation, 1,000 shares of Monitor Securities Corporation stock to Mrs. Gregory, in kind, in complete and final liquidation. Mrs. Gregory immediately thereafter sold the 1,000 shares of common stock of Monitor Securities Corporation, which she had received from Averill Corporation in complete liquidation, and which 1,000 shares also constituted the entire assets of Averill Corporation. She sold 1,000 shares of Montor Securities common stock for $133,333.33. Mrs. Gregory filed her income tax return and reported gain on the sale of this stock.

"The cost to Mrs. Gregory of the entire 5,000 shares of United Mortgage Corporation stock was $350,000.00. She retained all of that stock and still has it to-day. There have been no transfers of any kind in that stock since January 3, 1928, which is the last date on which she acquired the last block of the stock.

"In view of the fact that the distribution of the 1,000 shares of Monitor Securities Corporation stock to Mrs. Gregory occurred at the same time as the sale of said stock by her, the value of the stock to her would be exactly the same as the sale price; there could be no difference. That is, there was no difference between the value of Monitor stock, the 1,000 shares, at the time she received it in dis-
[fol. 33] solution of the Averill Corporation, and the amount for which she sold that stock. We admit she realized a gain immediately upon dissolution and distribution in kind to her of the Monitor stock from Averill Corporation, based on the value of the stock, at that time. * * * I am conceding that $133,333.33 is the value of the stock of the Monitor Securities Corporation at the time it was distributed to Mrs. Gregory; and the parties agree that, if the value of said stock is a factor to be considered, $133,333.33 is the right value.

"There are very few facts in dispute between the parties. The taxpayer has always shown the Department all of her records and has frankly admitted that the object and purpose of the plan of reorganization and the reorgan-

ization was for the purpose of reducing taxes in the best possible way."

Thereupon there was offered and received in evidence, as Petitioner's Exhibit 1, the letter from the Commissioner of Internal Revenue to the taxpayer, asserting the deficiency in tax which is here involved. Said letter is the same as the letter which is attached as Exhibit A to the taxpayer's petition to the Board of Tax Appeals, set forth in this record, except that it also includes the following statement with respect to the tax liability:

[fol. 34] "Statement

IT:AR:A-2.
MPB-60D.

In re Mrs. Evelyn F. Gregory, 1423 Albemarle Road, Brooklyn, New York

Tax Liability

Year	Tax liability	Tax assessed	Deficiency
1928	$22,856.63	$12,178.47	$10,678.16

"The report of the internal revenue agent in charge at Brooklyn, New York, dated March 29, 1930, is approved and is hereby made a part of this letter.

"Careful consideration has been given to your protests relative to the adjustments made by the agent. However, the action of the agent in increasing dividends by $133,333.33 and reducing capital net gain by $76,007.88 is sustained by this office.

"Due to the fact that the statute of limitations will presently bar any assessment of additional tax against you for the year 1928 the Bureau will be unable to afford you an opportunity under the provisions of article 1211 of Regulations 69 and/or article 451 of Regulations 74 to discuss your case before mailing formal notice of its determination as provided by section 274(a) of the Revenue Act of 1926 and/or section 272(a) of the Revenue Act of 1928. It is, therefore, necessary at this time to issue this formal notice of deficiency."

[fol. 35] Thereupon there was offered and received in evidence, as Petitioner's Exhibit 2, the conference memo-

randum and report transmitted to the Commissioner of Internal Revenue by the Internal Revenue Agent in Charge at Brooklyn, New York. The taxpayer admitted that all of the facts and figures stated in said memorandum and report were true; and the parties agreed that said memorandum and report might be regarded and used as a stipulation of facts. Said memorandum and report contains the following statements:

"Field Conference Report

Office of Internal Revenue Agent in Charge, Brooklyn, New York

Conference date: October 24, 1930.
Taxpayer: Evelyn F. Gregory.
Address: 1423 Albemarle Road, Brooklyn, N. Y.

Statement of Fact

"Taxpayer is a married individual, who filed a separate return for the year 1928 on the cash receipts and disbursements basis. She was not engaged in business.

"The examining officer in his report added to dividend income the amount of $133,333.33, received on the sale of 1,000 shares of Monitor Securities Corporation stock, and eliminated the capital gain of $76,007.88 reported by the taxpayer on this transaction:

"The relevant facts are stated in Schedule 1-a of the examining officer's report in part as follows:

[fol. 36] 'Schedule No. 1-A

Explanation of Items Changed

'Addition to income $133,333.33.

'Represents a dividend in the form of 1,000 shares of common stock of Monitor Securities Corporation, market value $133,333.33, received by the taxpayer from the United Mortgage Corporation (Section 115(a), Revenue Act of 1928, Article 627, Regulations 74).

'Taxpayer deemed the acquisition of the Monitor Securities Corporation stock to be in pursuance of a reorganization of the United Mortgage Corporation coming under Section 112(b) of the Act, rather than a dividend, and reported the subsequent sale of the stock as capital

net gain (Section 101 of the Act). A cost basis was arrived at by her substantially in accordance with Paragraph (2), Article 600, Reg. 74.

'Taxpayer owned 5,000 shares of stock of the United Mortgage Corporation, representing its entire capital stock. This corporation held among its assets 1,000 shares of Monitor Securities Corporation stock, which it acquired by purchase January 6, 1922, for $10,413.07.

'Under date of September 21, 1928, the United Mortgage Corp. transferred the 1,000 shares of Monitor Securities Corporation stock to the Averill Corporation, a holding company (incorporated in Delaware September 18, 1928), and in accordance with agreement, the Averill Corporation was to issue its capital stock in the name of United Mort- [fol. 37] gage Corporation stockholders as their respective interests may appear. This was effected September 21, 1928, the taxpayer, Evelyn F. Gregory, thereby came into possession of the entire capital stock of the Averill Corp., consisting of 500 shares of stock having a par value of $10.00 a share.

'Under date of September 24, 1928, the Averill Corporation was dissolved and pursuant to the dissolution, the Averill Corporation turned over its assets in liquidation to its stockholders. The assets consisted solely of the 1,000 shares of Monitor Securities Corporation stock turned over to it by the United Mortgage Corporation as previously explained. By virtue of the taxpayer owning the entire capital stock of the Averill Corporation, acquired as previously shown, she obtained possession of the 1,000 shares of Monitor Securities Corporation stock, September 21, 1928.

'Taxpayer's records show that on September 24, 1928, she sold the 1,000 shares of Monitor Securities Corporation stock for cash to a Mr. I. R. Stewart, sale price $133,-333.33. As explained in the foregoing, the transaction was included for tax under Section 101 by the taxpayer.

'In accordance with a balance sheet of the United Mortgage Corporation showing the market value of its holdings as at September 20, 1928, the 1,000 shares of Monitor Securities Corporation was shown to have a market value of $133,333.33, which was confirmed by its sale by the taxpayer soon after receipt, September 24, 1928.

[fol. 38] 'It is the opinion of the examining officer that a taxable dividend is involved in the transaction for the following reason:

'By turning the 1,000 shares of Monitor Securities Corporation stock over to the Averill Corporation, the United Mortgage Corporation parted with a valuable asset. In turning its own entire capital stock over to the taxpayer, the Averill Corporation stock and the Monitor Securities Corporation stock became interchangeable insofar as the taxpayer was concerned, and in the final analysis served to reduce the Monitor Securities Corporation stock to possession and control of the taxpayer.

'Capital Net Gain

* * * * * * *

	Selling price of securities	Cost	Profit
As reported	$223,160.83	$125,557.40	$97,603.43
Decrease	133,333.33	57,325.45	76,007.88

'Decrease shown in the above represents respectively the selling price, cost and profit on 1,000 shares of Monitor Securities Corporation common stock. Whereas examining officer deemed the acquisition of this stock by the taxpayer to be in fact a dividend received in 1928 from the United Mortgage Corporation, as previously explained, having a market value of $133,333.33, subsequent sale price, the adjustment is made to eliminate the transaction from this schedule of the return.

'The cost of $57,325.45 used by the taxpayer in reporting the sale of the Monitor Securities Corporation stock was arrived at as follows:

[fol. 39] Cost of 5,000 shares of United Mortgage Corporation stock	$350,000.00
Market value, Sept. 20, 1928	814,064.25
Market value of 1,000 shares Monitor Securities Corporation stock included in the amount of $814,064.25 shown in the above	133,333.33
$133,333.33 equals 16.3787% of $814,064.25. 16.3787% of $350,000.00 equals	57,325.45

'The value of $814,064.25 used for United Mortgage Corporation stock was based upon the market value of its assets, consisting entirely of securities, verified by the examining officer and accepted as correct.

'Additional facts involved in this transaction were stated in the examining officer's letter of transmittal as follows:

'On the books of United Mortgage Corporation, the transaction was entered as a charge to surplus for $10,413.07 and a credit to the investment asset account "Monitor Securities Corporation" stock for $10,413.07, which closed out the latter account. The surplus affected was accoumulated after February 28, 1913.

• • • • • • •

'Other than the above mentioned deal, there were no other transactions by the Averill Corporation.

• • • • • • •

'Other than the corporate minute book, there were no books of account kept by the Averill Corporation, none being deemed necessary.'

[fol. 40] "The taxpayer in her protest states the facts, in substantial agreement with the examining officer's account. In addition, it was stated therein that at a meeting of the Board of Directors held on September 20, 1928

'the following minutes and resolutions were adopted:

"The Chairman stated that United Mortgage Corporation owned 1,000 shares of the capital stock of Monitor Securities Corporation; that it was desired to effect a reorganization whereby said stock of Monitor Securities Corporation should be held by Averill Corporation, a Delaware corporation, and that the stock of Averill Corporation should be issued in the names of the stockholders of United Mortgage Corporation as their interests respectively appear.

The following resolutions were thereupon adopted:

Resolved that H. F. Lippold, Vice-President of the Company, be and he hereby is authorized, empowered and directed to offer on behalf of this Corporation to Averill Corporation to transfer and deliver to said Averill Corpo-

ration 1,000 shares of the common stock of Monitor Securities Corporation and to cause said Averill Corporation, if it accepts such offer, to issue 500 shares of its capital stock in payment therefor, said shares to be issued in the names of the stockholders of this corporation as their interests respectively appear.'' '

[fol. 41] Supplemental Statement

''At the time of transfer of the 1,000 shares of Monitor stock by United Mortgage Corp. to Averill Corp., taxpayer owned the entire capital stock of United Mortgage Corp.

''The 1,000 shares of Monitor Securities Corp. were purchased by United Mortgage Corp., January 6, 1922 for $10,413.07. The entire capitalization of Monitor Securities Corporation, as a matter of relevant information, consists of 40,481 shares of common stock and 29,338 shares of preferred stock. It is, therefore, obvious that United Mortgage Corporation holdings of Monitor Securities Corp. stock had no significance with respect to any relationship of these two corporations, other than the fact that the 1,000 shares of stock represented one of the investment assets of United Mortgage Corp. This asset was carried on the books at cost, although available data showed the market value of this asset as of Sept. 20, 1928 to be $133,333.33.

''On the above noted date, namely, Sept. 20, 1928, an agreement was entered into between the United Mortgage Corp. and a newly organized corporation named Averill Corporation, in accordance with which the United Mortgage Corp. transferred to Averill Corp. the 1,000 shares of Monitor Securities Corp. stock, and in payment therefor the Averill Corporation turned its own entire capital stock over to the stockholders of United Mortgage Corp. as paid up and outstanding.

''The taxpayer, Evelyn F. Gregory, by virtue of owning the entire capital stock of United Mortgage Corp., received [fol. 42] the entire stock of the Averill Corp., which consisted of 500 shares of common stock having a par value of $100.00 a share.

''The transfer was affected Sept. 21, 1928.

''On the books of United Mortgage Corp., the transaction was entered as a charge to surplus for $10,413.07 and a credit to the investment asset account 'Monitor Securities

Corporation' stock for $10,413.07, which closed out the latter account. The surplus affected was accumulated after February 28, 1913.

"The Averill Corp. existed in entirety for a few days only, it being dissolved Sept. 24, 1928 (incorporated Sept. 18, 1928).

"Other than the above mentioned deal, there were no other transactions by the Averill Corp.

"Pursuant to its liquidation, and by virtue of her owning its entire capital stock, the Averill Corp. turned over to the taxpayer the 1,000 shares of Monitor Securities Corp.

"Other than the corporate minute book, there were no books of account kept by the Averill Corp., none being deemed necessary.

"On Sept. 24, 1928, taxpayer sold the 1,000 shares of Monitor Securities Corp., for $133,333.33, arrived at a cost by apportioning the cost of her investment in United Mortgage Corp. stock under the reorganization section, and reporting the profit thus arrived at as capital net gain in view of the acquisition of the 1,000 shares of Monitor Securities Corp. stock by United Mortgage Corp. back in 1922."

[fol. 43] STIPULATION AS TO CERTAIN FACTS

Thereupon the parties stipulated and agreed that the following facts were true, to wit: The taxpayer, Evelyn F. Gregory, acquired 3,300 shares of United Mortgage Corporation stock between October 1, 1920 and December 16, 1921, for a total cost of $180,000.00; and she acquired 1,700 shares of United Mortgage Corporation stock between the dates of January 12, 1927 and January 3, 1928, at a total cost of $170,000.00.

Thereupon HENRY F. LIPPOLD, having first been duly sworn as a witness on behalf of the taxpayer, testified as follows:

Direct examination:

"My name is Henry F. Lippold and I reside at 100 Rugby Road, Brooklyn, New York. I am acquainted with Evelyn F. Gregory, the petitioner in this case. I have known her for approximately 24 years, and I have had business rela-

tions with her largely since 1920. I was associated in business with George D. Gregory, her husband, and through that association I kept the books of Mrs. Gregory which included her check book. I drew all of the checks, attended to all financial matters, made out income tax returns, attended to sales of stocks and bonds, had access to her safe deposit boxes and had power of attorney on her main banking account. During the year 1928 I kept her books, made her income tax return for that year, had access to her safe deposit box, had power of attorney on her checking account, and supervised the financial transactions in which she was engaged. All purchases and sales of stock went through me [fol. 44] finally; but sometimes Mr. Gregory would tell me what transactions were to be put through. I had knowledge of all of the transactions.

"I am acquainted with the transaction in which United Mortgage Corporation transferred 1,000 shares of Monitor common stock to the Averill Corporation. I was President of the Averill Corporation. Also, in 1928 I was a director of the Monitor Corporation and I was Vice-president, Treasurer and Director of the United Mortgage Corporation. When the Averill Corporation transferred to Mrs. Gregory its entire capital stock consisting of 500 shares of the par value of $10 a share, in accordance with the reorganization plan and agreement with the United Mortgage Corporation, Mrs. Gregory did not surrender to United Mortgage Corporation any of her stock or securities. Mrs. Gregory still retains the entire 5,000 shares of United Mortgage Corporation stock; she has the same certificate that she got in the early part of 1928 when she bought the last block of minority stock.

"I am acquainted with the transaction by which Mrs. Gregory sold 1,000 shares of Monitor Securities Corporation stock. She sold that stock to I. R. Stewart at a price of $133,333.33 for the entire block of 1,000 shares.

"Mrs. Gregory reported her income for Federal tax purposes on the calendar year basis and also on the cash receipts and disbursement basis."

[fol. 45] Thereupon there was offered and received in evidence, as Petitioner's Exhibit 3, the income tax return of the taxpayer, Evelyn F. Gregory, for the year 1928. Said return states that the occupation of the taxpayer was that

of "housewife", and that her gross income, deductions, net income and capital gain were as follows:

Income

Interest on Bank Deposits, Notes, Corporation Bonds, etc. (except interest upon which a tax was paid at source)	$1,484.88	
(a) Interest on tax-free Covenant Bonds upon which a tax was paid at source	1,097.93	
Dividends on Stock of Domestic Corporations	7,162.50	
Total Income		$9,745.31

Deductions

Tax paid	$482.88
Net Income	$9,262.43

Capital Net Gain

	Date acquired	Date sold	Amount received	Cost	Net gain or loss
Stocks & Bonds	1921-2-3	1928	$223,160.83	$125,557.40	$97,603.43

[fol. 46] Thereupon the witness continued to testify, on direct examination, as follows:

"I prepared and filed the income tax return of Mrs. Gregory for the year 1928. I made up that return from the books and records which I kept for her. The amount of capital gain, reported on the return in the amount of $97,603.43, includes a gain of $76,007.88 on the stock of the Averill Corporation and the sale of 1,000 shares of Monitor Securities Corporation; it also includes other gains. The amount of capital gain reported in excess of $76,007.88 relates to transactions not involved in this case."

On cross-examination the witness, Henry F. Lippold, testified as follows:

"By Mr. Corbin:

"Q. I believe you stated on direct examination that you are President of the Averill Corporation organized in 1928?

"A. That is right.

"Q. Could you tell me the purpose of the organization of the Averill Corporation?

"A. The entire transaction in the formation of Averill and its dissolution was carried out and supervised by counsel for Mrs. Gregory and on their advice.

"Board of Tax Appeals Member: The question is do you know the purpose?

"The Witness: At the time the possible opportunity to sell came along, the matter of income tax liability was discussed with Mrs. Gregory's counsel, and on their advice— [fol. 47] we were advised that we could effect a partial reorganization of the Monitor Securities Corporation by the formation of Averill Corporation and the turning over to Averill of 1,000 shares of Monitor stock, having the stock of Averill delivered direct to the stockholders of the United.

"The Member: Is it true that the purpose of the organization of the Averill was entirely to enable Mrs. Gregory to save income taxes which she might otherwise be required to pay if she carried through the transaction individually?

"The Witness: I do not see that there could be any other possible reason except to avail herself of the opportunity which the law and regulations afforded.

"By Mr. Corbin:

"Q. Did the Averill Corporation transact any other business?

"A. They did not."

Thereupon both the taxpayer and the Commissioner rested their cases.

The foregoing evidence is all of the material evidence adduced at the hearing before the Board of Tax Appeals, and the same is approved by the undersigned, E. Barrett Prettyman, General Counsel, Bureau of Internal Revenue, as attorney for the Commissioner of Internal Revenue.

(Signed) E. Barrett Prettyman, General Counsel, Bureau of Internal Revenue.

[fol. 48] The foregoing is all of the material evidence adduced at the hearing before the Board of Tax Appeals, and the same is approved by the undersigned, as attorney for the respondent on review.

George W. Saam, Attorney for Respondent on Review.

The foregoing is all of the material evidence adduced at the hearing and in order that the same may be preserved and made a part of the record, this statement of evidence is duly approved and settled this day of November, 1933.

——— ———, Member, United States Board of Tax Appeals.

ORDER APPROVING STATEMENT OF EVIDENCE

Approved and ordered filed this 23rd day of November, 1933.

(S.)J. M. Sternhagen, Member.

[fol. 49] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

PRÆCIPE FOR RECORD

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Second Circuit, copies duly certified as correct of the following documents and records in the above entitled cause in connection with the petition for review by the said Circuit Court of Appeals for the Second Circuit, heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries of the proceedings before the Board.
2. Pleadings before the Board:
   (a) Petition, including annexed copy of deficiency letter.
   (b) Answer.
3. Opinion of the Board promulgated December 6, 1932.

[fol. 50] 4. Judgment or Decision of the Board entered January 26, 1933.

5. Order of the Board vacating judgment and substituting judgment, entered March 25, 1933.

6. Petition for review, together with proof of service of notice of filing petition for review and of service of a copy of petition for review.

7. Statement of the evidence as settled and allowed.
8. Orders enlarging time for the preparation of the evidence and for the transmission and delivery of the record.
9. This præcipe.

(Signed) B. Barrett Prettyman, General Counsel, Bureau of Internal Revenue.

Service of a copy of the within præcipe is hereby admitted this 22nd day of November, 1933.

(Sgd.) George W. Saam, Attorney for Respondent on Review.

No Counter præcipe will be filed.

George W. Saam.

[fol. 51] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 52] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1933

No. 324

Argued February 21, 1934. Decided March 19, 1934

GUY T. HELVERING, Commissioner of Internal Revenue, Appellant,

v.

EVELYN F. GREGORY, Appellee

Appeal from the United States Board of Tax Appeals

Before L. Hand, Swan, and Augustus N. Hand, Circuit Judges

Appeal by the Commissioner of Internal Revenue from an order of the Board of Tax Appeals, expunging a deficiency in income taxes.

Allin H. Pierce, of Washington, D. C., for appellant.

Hugh Satterlee, of Washington, D. C., for appellee.

L. HAND, Circuit Judge:

This is an appeal (petition to review), by the Commissioner of Internal Revenue from an order of the Board of Tax Appeals expunging a deficiency in income taxes for the year 1928. The facts were as follows: The taxpayer owned all the shares of the United Mortgage Corporation, among whose assets were some of the shares of another company, the Monitor Securities Corporation. In 1928 it became possible to sell the Monitor shares at a large profit, but if this had been done directly, the United Mortgage Corporation would have been obliged to pay a normal tax on the resulting gain, and the taxpayer, if she wished to touch her profit, must do so in the form of a dividend, on which a surtax would have been assessed against her personally. To reduce these taxes as much as possible, the following plan was conceived and put through: The taxpayer incorporated in Delaware a new company, organized ad hoc, and called the Averill Corporation, to which the United Mortgage Corporation transferred all its shares in the Monitor Securities Corporation, under an agreement by which the Averill Corporation issued all its shares to

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the taxpayer. Being so possessed of all the Averill shares, she wound up the Averill company three days later, receiving as a liquidating dividend the Monitor shares, which she thereupon sold. It is not disputed that all these steps were part of one purpose to reduce taxes, and that the Averill Corporation, which was in existence for only a few days, conducted no business and was intended to conduct none, except to act as conduit for the Monitor shares in the way we have described. The taxpayer's return for the year 1928 was made on the theory that the transfer of the Monitor shares to the Averill Corporation was a "reorganization" under section 112 (i) (1) (B) of the Revenue Act of 1928 (26 U. S. C. A. § 2112 (i) (1) (B), being "a transfer by a corporation of * * * a part of its assets to another corporation" in such circumstances that immediately thereafter "the transferor or its stockholders or both are in control of the corporation to which the assets are transferred." Since the transfer was a reorganization, she claimed to come within section 112 (g) of that act, 26 U. S. C. A. § 2112 (g), and that her "gain" should not be "recognized," because the Averill shares were "distributed, in pursuance of a plan of reorganization." The Monitor shares she asserted to have been received as a single liquidating dividend of the Averill Corporation, and that as such she was only taxable for them under section 115 (c), 26 U. S. C. A. § 2115 (c) and upon their value [fol. 53] less the cost properly allocated to the Averill shares. That cost she determined as that proportion of the original cost of her shares in the United Mortgage Corporation, which the Monitor shares bore to the whole assets of the United Mortgage Corporation. This difference she returned, and paid the tax calculated upon it. The Commissioner assessed a deficiency taxed upon the theory that the transfer of the Monitor shares to the Averill Corporation was not a true "reorganization" within section 112 (i) (1) (B), 26 U. S. C. A. § 2112 (i) (1) (B), being intended only to avoid taxes. He treated as nullities that transfer, the transfer of the Averill shares to the taxpayer, and the winding up of the Averill Corporation ending in the receipt by her of the Monitor shares; and he ruled that the whole transaction was merely the declaration of a dividend by the United Mortgage Corporation consisting of the Monitor shares in specie, on which the taxpayer must pay a surtax calculated at their full value. The taxpayer appealed and

the Board held that the Averill Corporation had been in fact organized and was indubitably a corporation, that the United Mortgage Corporation had with equal certainty transferred to it the Monitor shares, and that the taxpayer had got the Averill shares as part of the transaction. All these transactions being real, their purpose was irrelevant, and section 112 (i) (1) (B) was applicable, especially since it was part of a statute of such small mesh as the Revenue Act of 1928; the finer the reticulation, the less room for inference. The Board therefore expunged the deficiency, and the Commissioner appealed.

We agree with the Board and the taxpayer that a transaction, otherwise within an exception of the tax law, does not lose its immunity, because it is actuated by a desire to avoid, or, if one choose, to evade, taxation. Any one may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury; there is not even a patriotic duty to increase one's taxes. U. S. v. Isham, 17 Wall. 496, 506, 21 L. Ed. 728; Bullen v. Wisconsin, 240 U. S. 625, 630, 36 S. Ct. 473, 60 L. Ed. 830. Therefore, if what was done here, was what was intended by section 112 (i) (1) (B), it is of no consequence that it was all an elaborate scheme to get rid of income taxes, as it certainly was. Nevertheless, it does not follow that Congress meant to cover such a transaction, not even though the facts answer the dictionary definitions of each term used in the statutory definition. It is quite true, as the Board has very well said, that as the articulation of a statute increases, the room for interpretation must contract; but the meaning of a sentence may be more than that of the separate words, as a melody is more than the notes, and no degree of particularity can ever obviate recourse to the setting in which all appear, and which all collectively create. The purpose of the section is plain enough; men engaged in enterprises—industrial, commercial, financial, or any other—might wish to consolidate, or divide, to add to, or subtract from, their holdings. Such transactions were not to be considered as "realizing" any profit, because the collective interests still remained in solution. But the underlying presupposition is plain that the readjustment shall be undertaken for reasons germane to the conduct of the venture in hand, not as an ephemeral incident, egregious to its prosecution. To dodge the share-

holders' taxes is not one of the transactions contemplated as corporate "reorganizations."

This accords both with the history of the section, and with its interpretation by the courts, though the exact point has not hitherto arisen. It first appeared in the Act of 1924 § 203, (h) (1) (B), 26 U. S. C. A. § 934 (h) (1) (B), and as the committee reports show (Senate Reports 398), was intended as supplementary to section 112 (g), 26 U. S. C. A. § 2112 (g), then section 203 (c), 26 U. S. C. A. § 934 (c); both in combination changed the law as laid down in U. S. v. Phellis, 257 U. S. 156, 42 S. Ct. 63, 66 L. Ed. 180, and Rockefeller v. U. S., 257 U. S. 176, 42 S. Ct. 68, 66 L. Ed. 186. In the House Report (No. 179, 68th Congress 1st Sess.), and in the Senate Report (No. 398), the purpose was stated to be to exempt "from tax the gain from exchanges made in connection with a reorgaization in order that ordinary business transactions will not be prevented." Cf. Lonsdale v. Com'r, 32 F. (2d) 537, 539 (C. C. A. 8); Prairie O. & G. Co. v. Motter, 66 F. (2d) 309, 311 (C. C. A. 10). Moreover, we regard Pinellas Ice & Cold Storage Co. v. Com'r, 287 U. S. 462, 53 S. Ct. 257, 77 L. Ed. 428, and our own decision in Cortland Specialty Co. v. Com'r, 60 F. (2d) 937, as pertinent, if not authoritative. In each the question was of the applicability of a precursor of section 112 (i) (1) (A) of [fol. 54] 1928, 26 U. S. C. A. § 2112 (i) (1) (A), to the sale of all the assets of one company to another, which gave in exchange, cash and short time notes. The taxpayer's argument was that this was a "merger or consolidation," because the buyer acquired "all the property of another corporation," the seller, that being one statutory definition of "merger or consolidation." That assumed, the exemption was urged to fall within section 112 (g) as here. It might have been enough to hold that short time notes were not "securities," within section 112 (g); but both courts went further and declared that the transaction was not a "merger or consolidation," but a sale, though literally it fell within the words of section 112 (i) (1) (A). This they did, because its plain purpose was to cover only a situation in which after the transaction there continued some community of interest between the companies, other than the holding such notes. The violence done the literal interpretation of the words in no less than what we do here. Moreover, the act itself gives evidence that, on occasion anyway, the purpose of a transaction shouldl be the guide;

thus in section 115 (g), 26 U. S. C. A. § 2115 (f), the cancellation of shares is to be treated as a dividend—though otherwise it would not be such—if it is "essentially equivalent to the distribution of a taxable dividend"; again in section 112 (c) (2), 26 U. S. C. A. § 2112 (c) (2), a distribution is in part taxable as a dividend, if it "has the effect of the distribution of a taxable dividend."

We do not indeed agree fully with the way in which the Commissioner treated the transaction; we cannot treat as inoperative the transfer of the Monitor shares by the United Mortgage Corporation, the issue by the Averill Corporation of its own shares to the taxpayer, and her acquisition of the Monitor shares by winding up that company. The Averill Corporation had a juristic personality, whatever the purpose of its organization; the transfer passed title to the Monitor shares and the taxpayer became a shareholder in the transferee. All these steps were real, and their only defect was that they were not what the statute means by a "reorganization," because the transactions were no part of the conduct of the business of either or both companies; so viewed they were a sham, though all the proceedings had their usual effect. But the result is the same whether the tax be calculated as the Commissioner calculated it, or upon the value of the Averill shares as a dividend, and the only question that can arise is whether the deficiency must be expunged, though right in result, if it was computed by a method, partly wrong. Although this is argued with some warmth, it is plain that the taxpayer may not avoid her just taxes because the reasoning of the assessing officials has not been entirely our own.

Order reversed; deficiency assessed.

[fol. 55] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the court-rooms in the Post Office building in the City of New York, on the 26th day of March one thousand nine hundred and thirty-four.

Present: Hon. Learned Hand, Hon. Thomas W. Swan, Hon. Augustus N. Hand, Circuit Judges.

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COMMISSIONER OF INTERNAL REVENUE, Petitioner,

vs.

EVELYN F. GREGORY, Respondent

Appeal from the United States Board of Tax Appeals

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the order of said United States Board of Tax Appeals be, and it hereby is, reversed.

It is further ordered that a Mandate issue to the said Board in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 56] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Commissioner of Internal Revenue vs. Evelyn F. Gregory. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Mar. 26, 1934. William Parkin, Clerk.

[fol. 57] UNITED STATES OF AMERICA,
Southern District of New York:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 56, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Commissioner of Internal Revenue, Petitioner, against Evelyn F. Gregory, Respondent, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 31st day of May, in the year of our Lord one thousand nine hundred and thirty-four, and of the Independence of the said United States the one hundred and fifty-eighth.

Wm. Parkin, Clerk. (Seal United States Circuit Court of Appeals, Second Circuit.)

[fol. 58] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 8, 1934

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 38,755. U. S. Circuit Court of Appeals, Second Circuit, Term No. 127. Evelyn F. Gregory, Petitioner, vs. Guy T. Helvering, Commissioner of Internal Revenue. Petition for a writ of certiorari and exhibit thereto. Filed June 23, 1934. File No. 127, O. T., 1934.

(5496-C)